Office-Supreme Court, U.S.
FILED
APR 29 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM — 1964

No. [redacted] 90

GLADYS JORDAN,

Petitioner,

—v.—

STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

SAM J. D'AMICO
610 Reymond Building
Baton Rouge, Louisiana

OSSIE B. BROWN
218 St. Louis Street
Baton Rouge, Louisiana

Attorneys for Petitioner

Franklin Press, Inc. Baton Rouge, La.

INDEX

	PAGE
Citation to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	3
Statement	3
How the Federal Questions Were Presented	10
Reasons for Granting the Writ	12
Conclusion	16
Certificate of Service	13a

TABLE OF CASES

Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624 3

Garner v. State of Louisiana, 368 U.S. 164, 82 S. Ct. 248 ..... 3, 13

Wright v. State of Georgia, 373 U.S. 284, 83 S. Ct. 1240 14

Cantwell v. Conn., 310 U.S. 296, 60 S. Ct. 900 15

TEXTS

16A Corpus Juris Secundum, Constitutional Law, Section 580 15

IN THE

Supreme Court of the United States

OCTOBER TERM — 1964

No. _____

GLADYS JORDAN,

Petitioner,

—v.—

STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the Matter of "State of Louisiana v. Gladys Jordan," No. 47405 on the Docket of said Court on January 18, 1965, which judgment affirmed a conviction and sentence of petitioner by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, in a criminal matter tried before the Court without a jury.

Citation to Opinions Below

The opinion of the Supreme Court of Louisiana is reported at _____ La. _____, 171 So. (2d) 650, and is set forth in the appendix hereto. The Nineteenth Judicial Court for the Parish of East Baton Rouge, at the time the accused was held to be guilty dictated reasons in the record (R-123), which are unreported, but which are printed in the appendix hereto.

Jurisdiction

The judgment of the Supreme Court of Louisiana was entered on January 18, 1965. (R-131) Thereafter, an application for rehearing was timely filed, (R-137) which was refused on February 23, 1965. (R-136) Thereupon, a petition for stay of mandate was filed with the Supreme Court of Louisiana, and on March 3, 1965, the Supreme Court of Louisiana granted a stay of execution of the decree for a period of sixty (60) days from March 3, 1965, in order that petitioner might apply to the United States Supreme Court for a writ of certiorari. (R-143) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), petitioner claiming rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

The following questions are presented by the present application:

(1) Whether the decision below affirms a criminal conviction based upon no evidence of guilt and, therefore, deprives petitioner of due process of law, under the principle estab-

lished in *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, and *Garner v. State of Louisiana*, 368 U.S. 164, 82 S. Ct. 248.

(2) Whether or not the statute under which petitioner was convicted is unconstitutional in that it does not denounce what is made a crime with such precision as to inform the person sought to be held accountable for a crime of what is criminal in his activities, in contravention of the due process clause of the Fourteenth Amendment.

Statutory and Constitutional Provisions Involved

(1) This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) This case also involves the Louisiana Barbiturate and Central Nervous System Stimulate Law, Louisiana Revised Statutes Title 40, Sec. 101, et seq., the relevant portions of which are set out in full in the appendix hereto.

Statement

Petitioner, Gladys Jordan, seeks a review of the judgment of the Supreme Court of Louisiana affirming her conviction and sentence for an alleged violation of Louisiana Revised Statutes 40:1033(4), which statute provides that the following shall be unlawful:

> "(4) The actual constructive possession or control of a barbiturate or a central nervous system stimulant by any person unless such person obtains such drug from the prescription of a practitioner, or unless such person obtains such drug by direct delivery by a practitioner for

a bonafide medical use; and except as provided in R.S. 40:1035."

This statute contains certain exceptions including an exception contained in Louisiana Revised Statutes 40:1034, which reads as follows:

> "Nothing in this Sub-part shall apply to any compound, mixture, or preparation containing, in addition to a barbiturate or a central nervous system stimulant, a sufficient quantity of another potent drug or drugs to prevent its use as (1) a hypnotic, or (2) a somnifacient or (3) a central nervous system stimulant, as the case may be."

Petitioner was charged in the Nineteenth Judicial District Court of Louisiana, Parish of East Baton Rouge, by an information filed on October 2, 1963 in case Number 47783, which information alleged that on or about the 17th day of July, 1963, petitioner "unlawfully violated R.S. 40:1033(4) in that she constructively possessed and controlled a Barbaturate (sic), to-wit: phenobarbital" (R-9).

Petitioner was arraigned and entered a plea of not guilty on October 2, 1963 (R-1). On November 26, 1963, the trial was commenced (R-6, R-63, et seq.) to the Court without a jury. Upon completion of the trial the Court found the accused guilty as charged (R-123), and released the defendant on the bond then in force for sentencing at the same time that he rendered a decision in a companion case.[1] (R-124). On May 19, 1964, the accused filed a motion for a new trial and motion in arrest of judgment (R-7, R-27, R-30). The motions

---

[1] In the companion case petitioner was convicted of attempted prostitution and sentenced to ninety (90) days in the Parish Jail. Petitioner's application to this Court for a Writ of Certiorari from this conviction and sentence, urging that she had been entrapped, was denied. No. 524, October Term 1964, on the Docket of this Court.

were argued by counsel for the accused and counsel for the State and submitted. The Court, for oral reasons assigned, overruled the motions. The accused excepted to the rulings of the Court and reserved formal bills of exception. The accused then was brought before the bar for sentence, and the Court sentenced the accused to be confined in the Parish Jail for six (6) months and to pay a fine of $750.00 and costs, and in default of payment of the fine to be confined in the Parish Jail for an additional one (1) year. The execution of the sentence was stayed pending further orders of the Court, the accused to be released on a new bond of $1,000 (R-7). On June 4, 1964, the accused entered an order of suspensive appeal returnable to the Supreme Court of the State of Louisiana (R-8).

On January 18, 1965, the Supreme Court of Louisiana, in a written opinion, affirmed the accused's conviction and sentence (R-131). The accused timely filed an application for a rehearing (R-137) which was denied on February 23, 1965 (R-136). One of the Associate Justices' of the Louisiana Supreme Court was of the opinion that a rehearing should be granted, as is shown by the Court's docket entry refusing the rehearing (R-136). This entry reads as follows:

"REHEARING REFUSED

47,405 State v. Jordan

McCALEB J., believes that a hearing should be granted to consider whether the uncontroverted evidence of defendant's expert—that Bellergal is not a hypnotic or somnifacient drug or a central nervous system stimulant because it contains, in addition to phenobarbital, sufficient quantities of other potent drugs (ergotamine and belladonna alkaloids) which make it impossible for it to be thus used—brings the case within

> R.S. 40:1034, exempting all such compounds, mixtures or preparations from the provisions of the Louisiana Barbiturate and Central Nervous System Stimulant Law."

After the application for rehearing was denied a petition for a stay of mandate was filed in the Supreme Court of Louisiana. On March 3, 1965, the Supreme Court of Louisiana granted a stay of execution of the decree for a period of sixty (60) days from March 3, 1965, in order that petitioner might apply to the United States Supreme Court for a writ of certiorari (R-143, R-146).

The facts material to a consideration of the questions presented are as follows:

Mr. Fred Sliman, a witness on behalf of the State, testified (R-98, et seq.) that he obtained a search warrant for the accused's house on or about July 17, 1963, and upon executing the search warrant he seized out of the medicine cabinet at the residence of the accused one plastic vial containing a red capsule and five green and tan tablets, all of which were in the same vial. He also seized a bottle containing a brown liquid substance. On the following day he turned this material over to the Louisiana State Police Crime Lab. It was his testimony that the Sheriff's Office executed the search warrant, seized the material, got a report from the Crime Lab which was forwarded to the District Attorney's Office, and then a warrant for her arrest was issued for the possession of the green and tan tablets (R-101).

Deputy Richard Wall testified that he was with Mr. Sliman the night that the material was seized, and that he transported the material to the State Police Crime Lab (R-103).

Mr. Travis Owen, a chemist with the Louisiana State Police

Laboratory, testified (R-63, et seq.) that he ran a qualitative analysis on certain pills that were brought to him on or about July 18, 1963. He stated that there was a small vial containing a capsule and five tablets and there was also a two-ounce bottle containing a dark colored liquid. The capsule and the dark brown liquid were analyzed and found to be free of amphetamines, barbiturates and narcotics. However, he found that the five tablets contained phenobarbital. It was his opinion that phenobarbital was a central nervous system depresent or somnifacient. He testified that the bottle with the dark liquid was of no interest in the case, and the same was true of the capsule, but that the green pills did contain phenobarbital. He defined a somnifacient drug as a drug which would produce or tend to produce a state of somnolence or sleep.

On cross-examination he stated that he did not make a quantitative determination of the amount of the barbiturate present, and that the tablets had the appearance of a tablet which is put out by the Sandoz Company called Bellergal. He stated that the tablets were in a somewhat degraded condition and were not in what is called factory or mint condition, and had been altered possibly by moisture. He further testified that he did not determine the amount of the barbiturate acid or the phenobarbital that was in these particular tablets, nor did he determine what the quantity was of the other drugs that may have been mixed with it. He stated that he did not separate these other chemicals which were present, but that he did perform an analysis which to his satisfaction indicated them to be the same as those present in Bellergal tablets. It was his opinion that these tablets did not contain a sufficient quantity of another drug to prevent their use as a somnifacient. However, he further stated that he did not know how much phenobarbital in a capsule would serve as a somnifacient, and that he did not know how many of the capsules could be taken to serve as a somnifacient.

Dr. Howard Hansen, a witness called on behalf of the defendant, testified (R-104, et seq.) that he had graduated from George Washington University in 1934, and after internship in 1935, had been practicing medicine for about twenty-eight years. He had been practicing in Baton Rouge since 1948 and was a member of the East Baton Rouge Parish Medical Society, Louisiana State Medical Society, and the American Medical Association. He did general practice, internal and industrial medicine. Dr. Hansen stated that he had treated the accused since about 1957, and had prescribed tablets known as Bellergal. He was shown the tablets which had been introduced in evidence and he stated that they looked very similar to Sandoz Bellergal space tabs. They appeared to be a little greener than the fresh tablets, but they had the same "X" marks as the Bellergal tabs. He further stated that it was his recollection that in March or April, 1963, he had prescribed such medicine for the accused because she was at that time suffering from what appeared to be a vascular type of headache. It was his belief that he had given her a sample package of the tablets from his office. He stated that when the manufacturers representative came around he usually left a few and that when a patient suffered from this kind of headache he usually gave them a sample and told them how to take them. He recalled specifically prescribing these tablets for the accused. He stated that the chemical components of Bellergal were ergotamine, belladonna alkaloid and phenobarbital. His testimony as contained in page 108 of the record should have fully disposed of this case, as he testified as follows:

"Q. Do you know whether it contains a sufficient amount of other drugs that would prevent its use as a hypnotic or somnifacient?

"A. Yes, if they used it in excessive dosage to cause a somnifacient or hypnotic where the ergotamine

would cause such gastric and abdominal distress that it would be impossible for the patient to stand it.

"Q. In other words, it has other drugs or other components in it of a sufficient quantity which would prevent its use as a hypnotic or somnifacient?

"A. That's correct.

Further, on page 109 of the record, he testified as follows:

"Q. Isn't it a medical fact that this particular type of pill is prescribed—well, let me rephrase the question, what is a somnifacient, Doctor?

"A. It is a drug that will make you sleepy.

"Q. Right, and isn't this pill prescribed as a somnifacient?

"A. Not by me.

"Q. Well is it also a pain killer?

"A. That's correct.

"Q. Well, what effect does it have on a person then?

"A. The most active principle in this is the ergotamine which has a constricting effect on the arterioles."

He was unable to state unequivocally that the pills in evidence were Bellergal pills, but he said that they had the same appearance except that they seemed to be a little bit greener than a fresh pill, and he thought that the color would change with age and handling. Finally he testified from his records that he had last prescribed phenobarbital and bellergal to the accused on June 14, 1963.

How the Federal Questions Were Presented

The questions sought to be reviewed here are as follows:

In a motion for new trial petitioner asserted, inter alia, (R-27):

> "6. That the State failed to offer any evidence and failed to prove that the alleged drug was not obtained on the prescription of a practitioner or that there was a direct delivery by a practitioner for bona fide medical use, nor that the accused was not an exception under R.S. 40:1035.
>
> "7. That there is a total lack of evidence to show there was not a sufficient quantity of another drug or drugs which would prevent the use of the alleged barbiturate as a hypnotic, somnifacient or central nervous system stimulant."

In the motion in arrest of judgment the accused alleged inter alia, as follows (R-30):

> "(c) That R.S. 40:1031 through 1046 are unconstitutional, null and void and in violation of Louisiana Constitution Article 1, Section 10 and the 14th Amendment of the U.S. Constitution, more particularly for the following reasons:
>
> "1. R.S. 40:1032 in defining the words 'barbiturate' or 'barbiturates' does not define what is a hypnotic or somnifacient drug.
>
> "2. The accused is denied equal protection of the law because there are various and sundry exceptions under said law which gives preference to certain individuals relative to the administration of said law.
>
> "(d) The bill of information is null and void because it fails to charge the accused with the violation of any

law, particularly in that the act does not make it a crime to possess phenobarbital.

"(e) That said bill of information was too vague to permit the accused to properly prepare a defense herein."

In the application for rehearing filed before the Supreme Court of Louisiana the accused again urged that the Court erred in finding the statutes constitutional (R-137).

In the petition filed in the Supreme Court of Louisiana for a stay of mandate it was alleged inter alia (R-143):

"2. That the opinion and decree of this Honorable Court deprives petitioner of the rights guaranteed her under Article 1 Section 10 of the Constitution of the State of Louisiana and of the 14th Amendment of the Constitution of the United States in depriving her of her property and liberty without due process of law as follows:

"(a) That the bill of information charging the accused in substance 'then and there being unlawfully violated R.S. 40:1033 (4) in that she constructively possessed and controlled a Barbiturate, to-wit: phenobarbital, * * * ' is vague, indefinite and charges no violation of law, is a conclusion of law and fails to allege the necessary elements of the offense sought to be charged.

"(b) That said bill of information fails to allege that the accused had not obtained such drug on the prescription of a practitioner or by direct delivery from a practitioner for bona fide medical uses nor that she was excepted under R.S. 40:1035.

"(c) That R.S. 40:1031 through 1046 are unconstitutional, null and void and in violation of Louisiana Constitution Article 1, Section 10 and the 14th Amendment of the U.S. Constitution, more particularly for the following reasons:

"1. R.S. 40:1032 in defining the words 'barbiturate' or 'barbiturates' does not define what is a hypnotic or somnifacient drug.

"2. The accused is denied equal protection of the law because there are various and sundry exceptions under said law which gives preference to certain individuals relative to the administration of said law.

"(d) The bill of information is null and void because it fails to charge the accused with the violation of any law, particularly in that the act does not make it a crime to possess phenobarbital.

"(e) That said bill of information was too vague to permit the accused to properly prepare a defense herein.

"3. In the alternative even if the Statute is constitutional, there was an unconstitutional application thereof and a deprivation of the accused, of her liberty without due process of law and in violation of the 14th Amendment of the United States Constitution in that the Court refused to consider the uncontroverted evidence of defendant's expert, that the purported drug allegedly found in possession of applicant was not a hypnotic or somnifacient drug, which would bring the case within R.S. 40:1034 exempting such compounds, mixtures or preparations from the provisions of the law relative to possession of barbiturates or central nervous system stimulants. R.S. 40:1031, et seq."

REASONS FOR GRANTING THE WRIT

1. THERE IS NO EVIDENCE TO SUPPORT THE CONVICTION.

In view of Dr. Hansen's testimony which is hereinabove reviewed, and which Associate Justice McCaleb of the Lou-

isiana Supreme Court considered to be uncontroverted, it is obvious that the accused here has been convicted of something which is not denounced as a crime, as under the provisions of Section 1034 of Title 40 of the Louisiana Revised Statutes, the Barbiturate and Central Nervous System Stimulant Law does not apply to any compound, mixture or preparation containing in addition to a barbiturate or a central nervous system stimulant, a sufficient quantity of another potent drug or drugs to prevent its use (1) a hypnotic, or (2) a somnifacient or (3) a central nervous system stimulant, as the case may be. In the present case it was conclusively shown that the seized tablets were Bellergal, and that this was not a hypnotic or somnifacient drug or central nervous system stimulant because it contained in addition to phenobarbital sufficient quantities of other potent drugs which made it impossible for it to be thus used.

In *Garner v. State of Louisiana*, supra, this Court reviewed the records and found that they contained no evidence to support a finding of guilt, and held that the convictions violated the petitioner's rights to due process of law guaranteed to them by the Fourteenth Amendment to the United States Constitution. In the present case there was not only a lack of evidence, but the record affirmatively shows that the accused had not violated the statute. Paraphrasing the language of Chief Justice Warren in the *Garner* case, this conviction is so totally devoid of evidentary support as to render it unconstitutional under the due process clause of the Fourteenth Amendment.

2. THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS UNCONSTITUTIONAL.

It is so well settled as to hardly require any citation of authority that conviction under a criminal enactment which

does not give adequate notice that the conduct charged is prohibited is violative of due process. *Wright v. State of Georgia*, 373 U.S. 284, 83 S. Ct. 1240, and cases therein cited. An examination of the statute presently under consideration makes it manifest that it is violative of this constitutional prohibition.

In Louisiana Revised Statutes 40:1032 the definition of prohibited drugs includes all hypnotic or somnifacient drugs regardless of their composition. Further, in Louisiana Revised Statutes 40:1034 it is provided that the provisions of the statute shall not apply to "any compound, mixture or preparation containing, in addition to a barbiturate or a central nervous system stimulant, a **sufficient** quantity of another potent drug or drugs to prevent its use as (1) a hypnotic, (2) or a somnifacient or (3) a central nervous system stimulant, as the case may be." (Emphasis supplied).

In the present case the State chemist could not identify specifically the other drugs in the tablets introduced in evidence. Yet, the State would apparently place a burden upon every individual of having a chemical analysis made of everything contained in his medicine cabinet, or being subjected to a criminal prosecution in which the burden would be placed upon the individual of proving that he is exempt from the statute. Even if a layman knew what drugs might be contained in a tablet, how could he ascertain whether or not a tablet contained a **sufficient quantity** of another potent drug to prevent its use as a hypnotic, somnifacient, or nervous system stimulant. The statute, therefore, provides no standard by which an accused may determine whether or not medications in his possession are prohibited by the statute, as neither the phrase "sufficient quantity," or the phrase "potent drug" is defined in such a manner as to advise the accused that his possession of the medication is prohibited.

A criminal statute must be sufficiently explicit in its description of the acts, conduct, or conditions forbidden to prescribe the elements of the offense with reasonable certainty, and must fix an ascertainable standard of guilt, and make known to those to whom it is addressed what conduct on their part will render them liable for its penalties. It must not be so vague that men of common intelligence must guess at its meaning and differ as to its application. 16A Corpus Juris Secundum, Constitutional Law, Section 580. In the present case every ordinary citizen would be compelled to have a chemical analysis made of the entire contents of his medicine cabinet in order to be sure that the statute was not being violated. The statute here under consideration sweeps within its ambit "a great variety of conduct under a general and indefinite characterization, . . . leaving to the executive and judicial branches too wide a discretion in its application." *Cantwell v. Conn.*, 310 U.S. 296, 60 S. Ct. 900.

The State chemist could not identify the other drugs composing the tablet involved, yet R.S. 40:1044 imposes upon the defendant the burden of proof of an exemption under the statute. R.S. 40:1034 provides no standards by which an accused may determine which is or is not "a sufficient quantity of another potent drug or drugs to prevent its use as a (1) hypnotic or (2) somnifacient. Thus, the accused is not advised as to the degree of proof required in order to establish the exemption. This is a matter which is left entirely to the trier of the facts, and constitutes an invasion of the legislative function of establishing ascertainable standards of guilt. It is, therefore, manifest that this statute is violative of due process.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted herein.

Respectfully submitted,

SAM J. D'AMICO
610 Reymond Building
Baton Rouge, Louisiana

OSSIE B. BROWN
218 St. Louis Street
Baton Rouge, Louisiana

Attorneys for Petitioner

APPENDIX

Trial Court's Reasons for Judgment

COURT'S RULING ON NO. 47,783:

BY THE COURT:

The issue here is strictly a technical one insofar as the tablets in evidence are concerned. The chemist from the State Laboratory made a sufficient analysis to satisfy me that these particular tablets consist of and are a barbiturate. Dr. Hansen says there is a difference between them and the Bellergal that he referred to and that these tablets only resemble Bellergal and he does not know whether they are Bellergal or not. The chemist says that they do not contain sufficient amount of other potent drugs to bring them within the exception referred to in the law. Dr. Hansen further said that on his last prescription to this defendant he gave her both phenobarbital and Bellergal indicating that — to me, at least, that they are different type drugs. I would not be too concerned about what Bellergal contains. There isn't any question but what they fall within the definition given in Section 1032 and they fall within the prohibitive area prescribed by 1033 (4).

There will be a verdict of guilty as charged.

MR. PITCHER: Will you render a verdict in the attempted prostitution case, Judge?

THE COURT: No, not right now.

Opinion of the Louisiana State Supreme Court

STATE OF LOUISIANA	:	
	:	No. 47,405
V.	:	
	:	SUPREME COURT OF LOUISIANA
GLADYS JORDAN	:	

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT
PARISH OF EAST BATON ROUGE
HONORABLE JESS JOHNSON, JUDGE

FOURNET, Chief Justice.

Defendant, Gladys Jordan, prosecutes this appeal from a conviction under a bill of information which charged her with an unlawful violation of R.S. 40:1033 (4)[1] "in that she constructively possessed and controlled a Barbaturate (sic), to-wit: phenobarbital," and her sentence[2] thereunder, relying for a reversal thereof on two bills of exception which were reserved after verdict and before sentence when the trial judge refused her motions (1) for a new trial and (2) in arrest of judgment.

---

[1] R.S. 40:1033, entitled "Prohibited acts" under the Louisiana Barbiturate and Central Nervous System Stimulant Law, states in part:

"The following shall be unlawful:

* * *

"(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant by any person, unless such person obtained such drug on the prescription of a practitioner, or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use; and except as provided in R.S. 40:1035."

[2] The defendant was sentenced to serve six months in jail and to pay a fine of $750 and costs; in default of payment of the fine, an additional jail sentence of one year was imposed.

The first bill of exception, based primarily on defendant's contention that the state failed to offer any evidence showing the venue of the court was East Baton Rouge Parish, is clearly without merit. While it is the settled jurisprudence of this state[3] that on the trial of all criminal cases the district attorney has the burden of proving the offense was committed within the parish where the prosecution is initiated, the record in the instant case reveals that the deputy sheriff who had secured a warrant for the search of the premises occupied by the defendant Gladys Jordan "located at 2220 Ellissalde Street, Baton Rouge, Louisiana, in the Parish of East Baton Rouge. * * *" where he had good reason to believe there was a certain quantiity of drugs, illegally possessed under the Uniform Narcotic Drug Law, testified that he executed the warrant and made the return thereon after seizing the subject pills on the premises, in which he was fully corroborated by the warrant and his return filed in evidence.

The claim in the motion for a new trial that the evidence failed to establish the seized pills were obtained without a prescription, an exception from the provision of prohibited acts, is also without merit for when her own physician was placed on the stand for the specific purpose of clarifying this point, he stated he could not testify those were the same pills he had prescribed for her several months previously. Moreover, what comes by way of an exception in a statute must be urged by way of defense, R.S. 15:228[4], and the

---

[3] *State v. Paternostro*, 224 La. 87, 68 So. 2d 767; *State v. International Paper Co.*, 201 La. 870, 10 So. 2d 685; *State v. Hart*, 195 La. 184, 196 So. 62.

[4] R.S. 15:228 "Averment of proviso of statute

"It is no objection to an indictment that it does not aver that accused was not embraced within the terms of the proviso of the statute creating the offense; for what comes by way of a proviso or exception in a statute must be urged by way of defense."

burden of proving such a proviso or exemption rests upon the defendant, R.S. 40:1044[5].

The motion in arrest of judgment is based on several allegations, which are equally without merit, but for the purpose of the disposition thereof, will be grouped as follows:

The bill of information is fatally defective (1) in that it does not state every fact and circumstance necessary to constitute the offense as required by R.S. 15:227[6] (Par. a), (2) the act under which she was charged does not make it a crime to possess phenobarbital (Par. d), (3) the bill was too vague to permit the defendant to properly prepare a defense (Par. e), and (4) the bill of information fails to allege that the drugs had not been obtained for bona fide medical uses nor that she was excepted under R.S. 40:1035[7] (Par. b).

---

[5] R.S. 40:1044 "Exceptions and exemptions not required to be negatived

"In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this Sub-part, it shall not be necessary to negative any exception* excuse, proviso or exemption contained in this Sub-part, and the burden of proof in any such exception, excuse, proviso or exemption, shall be upon the defendant."

*As it appears in the enrolled bill; obviously a comma was omitted after this word.

[6] R.S. 15:227 "Contents of indictment

"The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute, be used."

[7] R.S. 40:1035 "Medical or scientific purposes

"The provisions of paragraphs (1) and (4) of R.S. 40:1033 shall not be applicable; (1) to the delivery for medical or scientific purposes only of barbiturates or central nervous system stimulants to persons included in any of the classes hereinafter named, or to the agents or employees of such persons, for use in the usual course of their business or practice or in the performance of their official duties, as the case may be; or (2) to the actual or constructive possession or

Defendant also contends Revised Statutes 40:1031 through 1046 are unconstitutional for the reason that 40:1032[8] "in defining the words 'barbiturate' or 'barbiturates' does not define what is a hypnotic or somnifacient drug" in violation of Article 1, Section 10 of the Louisiana Constitution of 1921, and because of the "various and sundry exceptions" in the administration of said law, these statutes are in contravention of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States (Par. c).

A mere reading of the bill of information clearly shows that it tracts the language of the statute, specifically designating the defendant "unlawfully violated R.S. 40:1033 (4) in that she constructively possessed and controlled a Barbaturate (sic), to wit: phenobarbital," which is all that is required by

---

control of barbiturates or central nervous system stimulants by such persons or their agents or employees for such use, to wit:

(a) Pharmacists

(b) Practitioners

(c) Persons who procure barbiturates or central nervous system stimulants (A) For disposition in good faith and in the course of professional practice only, by or under the supervision of pharmacists or practitioners employed by them, or (B) for the purpose of lawful research, teaching, or testing, and not for resale.

(d) Hospitals and other institutions which procure barbiturates or central nervous system stimulants for lawful administration by practitioners, but only for use by or in the particular hospital or other institution.

(e) Officers or employees of federal, state or local governments.

(f) Manufacturers, wholesalers, carriers, and warehousemen."

[8] R.S. 40:1032 "Definitions

"For the purposes of this Sub-part:

"(1) The words 'barbiturate' or 'barbiturates' mean each of the salts and derivatives of barbituric acid, also known as malonyl urea, and derivatives, compounds, mixtures or preparations thereof; and 'barbiturate' or 'barbiturates' shall include all hypnotic or somnifacient drugs, whether or not derivatives of barbituric acid, except that this Sub-part shall not apply to (a) narcotics as now or hereafter defined by the legislature of the state of Louisiana, or (b) bromides."

R.S. 15:227 (see footnote six). Whether phenobarbital is a barbituate is a question of fact over which we have no jurisdiction. If the defendant thought the bill of information was too vague to properly prepare her defense, she should have urged this before arraignment in a motion for a bill of particulars, R.S. 15:284[9], and having failed to do so, such defect, if any, is cured by verdict, R.S. 15:418[10]; and the state charging a person with an offense is not required to negative any exemption or proviso in a statute creating the offense, R.S. 15:228, R.S. 40:1044 (see footnotes four and five).

The allegation that the statutes are unconstitutional because of the failure on the part of the legislature to define "hypnotic or somnifacient drugs" has no substance as the words "hypnotic" or "somnifacient" drugs mean nothing more than drugs that produce sleep, and such meaning is well known. Equally lacking in merit is the defendant's contention that the exemptions contained in the act are denial of equal protection guaranteed by the Fourteenth Amendment. A review of the statutes indicates the legislature has set forth reasonable classifications of persons associated with the use of barbituates in its effort to control the use thereof, delineating in detail for each category or class the acts which are to be considered offensive, the procedure to be applied in the pro-

---

[9] R.S. 15:284 "Time and method of taking objections to indictment; amendment of indictment

"Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared."

[10] R.S. 15:418 "Effect of verdict on imperfections in, and omissions from the indictment

"All averments imperfectly stated in the indictment are cured by verdict, but the omission from the indictment of any essential averment constitutes an incurable defect."

secution thereof, and the punishment to be inflicted. Such legislation is a valid exercise of the state's inherent police power and becomes otherwise only if arbitrary distinctions are made between different classes of persons or persons within the same class, which is obviously not the case herein.

For the reasons assigned, the conviction and sentence appealed from are affirmed.

Relevant Sections of the Louisiana Barbiturate and Central Nervous System Stimulant Law as Contained in Title 40 of Louisiana Revised Statutes of 1950

§ 1032. Definitions

For the purposes of this Sub-part:

(1) The words "barbiturate" or "barbiturates" mean each of the salts and derivatives of barbituric acid, also known as malonyl urea, and derivatives, compounds, mixtures or preparations thereof; and "barbiturate" or "barbiturates" shall include all hypnotic or somnifacient drugs, whether or not derivatives of barbituric acid, except that this Sub-part shall not apply to (a) narcotics as now or hereafter defined by the legislature of the state of Louisiana, or (b) bromides.

(2) The words "central nervous system stimulant" or "central nervous system stimulants" mean amphetamine and desoxyephedrine, and any derivative, compound, mixture or preparation thereof.

(3) The term "delivery" means selling, dispensing, giving away, leaving with, or supplying in any other manner.

(4) The term "patient" means, as the case may be, (a) the individual medically requiring a barbiturate or a central nervous system stimulant, for whom a barbiturate or central nervous system stimulant is prescribed, or to whom a barbiturate or a central nervous system stimulant is administered; or (b) the owner or the agent of the owner of an animal medically requiring a barbiturate, or a central nervous system stimulant, for which a barbiturate or a central nervous system stimulant is prescribed or to which a barbiturate or a central nervous system stimulant is administered.

(5) The term "person" includes individual, corporation, partnership, and association.

(6) The term "practitioner" means a person authorized by law to practice medicine, dentistry, osteopath or veterinary medicine in this state.

(7) The term "pharmacist" means a person duly registered with the Louisiana Board of Pharmacy as a compounder, dispenser, or supplier of drugs upon prescription, including qualified assistant pharmacists as defined by existing laws.

(8) The term "prescription" means an order, issued in good faith in the course of professional practice only, by a practitioner to a pharmacist for a barbiturate or a central nervous system stimulant for a particular patient, which specifies the date of its issue, the name and address of such practitioner, the name and address of the patient (and, if such barbiturate or central nervous system stimulant is prescribed for an animal, the species of such animal), the name and quantity of the barbiturate or central nervous system stimulant prescribed, the directions for the use of such drug, and the signature of such practitioner; provided that such prescriptions received by word of mouth, telephone, telegraph or other means of communication shall be recorded in writing by the pharmacist, and the record so made shall constitute the original prescription to be filed and preserved by the pharmacist.

(9) The term "manufacturer" means a person who manufactures barbiturates or central nervous system stimulants, and includes persons who prepare such drugs in dosage forms by mixing, compounding, encapsulating, entableting, packaging, or other process, but does not include a pharmacist who merely packages, prepares or compounds drugs to fill prescriptions received, or to be received by him from practitioners.

(10) The term "wholesaler" means persons engaged in the business of distributing barbiturates or central nervous system stimulants to persons included in any of the classes named in subdivisions (a) to (f) inclusive of R.S. 40:1035. Acts 1952, No. 296, §1.

§ 1033. Prohibited acts

The following shall be unlawful:

(1) To deliver or cause to be delivered any barbiturate or central nervous system stimulant (except as provided in R.S. 40:1035) unless—

(a) Such barbiturate or central nervous system stimulant is delivered by a pharmacist in good faith, upon an original prescription, or an authorized refill thereof, as hereinafter provided, and there is affixed to the immediate container in which such drug is delivered a label bearing: (A) the name and address of the establishment from which such drug was delivered; (B) the date on which the prescription for such drug was filled; (C) the number of such prescription as filed in the prescription files of the pharmacist who filled such prescription; (D) the name of the practitioner who prescribed such drug; (E) the name of the patient, and if such drug was prescribed for an animal, a statement showing the species of the animal; and (F) the directions for the use of the drug as contained in the prescription; or

(b) Such barbiturate or central nervous system stimulant is delivered or administered by a practitioner in good faith and in the course of professional practice only, and the im-

mediate container in which such drug is delivered bears a label on which appears the date of delivery, the directions for use of such drug, the name of such practitioner, the name of the patient and, if such drug is prescribed for an animal, a statement showing the species of the animal.

(2) The refilling of any prescription for a barbiturate or a central nervous system stimulant unless and to the limited extent designated on the prescription by the practitioner, or subsequently authorized by him; provided that no prescription for a barbiturate or a central nervous system stimulant shall be refilled after ninety days from its original date; and provided further that any refill authorization received by word of mouth, telephone, telegraph or other means of communication shall be recorded in writing by the pharmacist, with the date thereof, on the face or on the reverse side of the original prescription.

(3) The delivery of a barbiturate or a central nervous system stimulant upon prescription unless the pharmacist who filled such prescription files and retains it for a period of five years.

(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant by any person, unless such person obtained such drug on the prescription of a practitioner, or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use; and except as provided in R.S. 40:1035.

(5) The refusal to make available and to afford full opportunity to check any record, file, stock or inventory, as required by R.S. 40:1037.

(6) The failure to keep records as required by R.S. 40:1036.

(7) The using by any person to his own advantage, or the revealing of any information required under the authority of R.S. 40:1037, concerning any method or process which, as a trade secret, is entitled to protection, except to law enforce-

ment officers or an officer or employee of the Louisiana Board of Pharmacy, or to a court when relevant in a judicial proceeding under this Sub-part.

(8) Obtaining or attempting to obtain a barbiturate or a central nervous system stimulant, or procuring or attempting to procure the administration of a barbiturate or a central nervous system stimulant, (a) by fraud, deceit, misrepresentation or subterfuge; or (b) by the forgery or alteration of a prescription; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(9) Wilfully making a false statement in any prescription, order, report, or record, referred to in this Sub-part.

(10) Falsely assuming the title of, or falsely representing any person to be, a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian, or other authorized person for the purpose of obtaining a barbiturate or a central nervous system stimulant.

(11) Making, issuing or uttering any false or forged prescription.

(12) Affixing any false or forged label to a package or receptacle containing a barbiturate or a central nervous system stimulant.

(13) The selling, giving, delivering, administering or dispensing of any barbiturate or central nervous system stimulant by any person (except as provided in R.S. 40:1033(1) (a), (b) and (2) in R.S. 40:1035) to a person under the age of twenty-one years. Acts 1952, No. 296, § 2, as amended Acts 1964, No. 429.

§ 1034. Exemptions

Nothing in this Sub-part shall apply to any compound, mixture, or preparation containing, in addition to a barbiturate or a central nervous system stimulant, a sufficient quantity

of another potent drug or drugs to prevent its use as (1) a hypnotic, or (2) a somnifacient or (3) a central nervous system stimulant, as the case may be. Acts 1952, No. 296, § 3.

§ 1044. Exceptions and exemptions not required to be negatived

In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this Sub-part, it shall not be necessary to negative any exception excuse, proviso or exemption contained in this Subpart, and the burden of proof in any such exception, excuse, proviso or exemption, shall be upon the defendant. Acts 1952, No. 296, § 13.

§ 1046. Penalties

Any person who violates any of the provisions of this Subpart shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars, or shall be imprisoned in the parish jail for not more than two years, or both such fine and imprisonment. For any second or succeeding offense, any person violating any provision of this Sub-part shall be punished by a fine of not more than five thousand dollars or shall be confined in the state penitentiary, with or without hard labor, for not more than five years, or both such fine and imprisonment.

Any person who violates the provisions of R.S. 40:1033, Sub-paragraph (13) shall be imprisoned at hard labor for not more than ten years. Acts 1952, No. 296, § 15, as amended Acts 1964, No. 430, § 1.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition has been served on (1) Honorable Sargent Pitcher, Jr., District Attorney, Parish of East Baton Rouge, Louisiana, and (2) The Supreme Court of the State of Louisiana, by depositing the same in the United States Mail, with first class postage, prepaid, properly addressed to the respective addresses.

Baton Rouge, Louisiana, _____, 1965.

SAM J. D'AMICO
610 Reymond Building
Baton Rouge, Louisiana

OSSIE B. BROWN
218 St. Louis Street
Baton Rouge, Louisiana

Attorneys for Gladys Jordan

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 2 91965
JOHN F. DAVIS, CLERK

No. 90

In the Supreme Court of the United States

GLADYS JORDAN,

Petitioner,

v.

STATE OF LOUISIANA,

Opponent.

BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF LOUISIANA

JACK P. F. GREMILLION,
Attorney General.

SARGENT PITCHER, JR.,
District Attorney.

RALPH L. ROY,
Assistant District Attorney.

No. 90

In the Supreme Court of the United States

GLADYS JORDAN,

Petitioner,

v.

STATE OF LOUISIANA,

Opponent.

BRIEF IN OPPOSITION IN BEHALF OF THE STATE OF LOUISIANA

ARGUMENT

The bill of information herein charges petitioner with the violation of LSA R.S. 40:1033(4), which provides:

> "The following shall be unlawful:
> "(4) The actual or constructive possession or control of a barbiturate or a central nervous system stimulant by any person, unless such person obtained such drug on the prescription of a practitioner, or unless such person obtained such drug by direct delivery from a practitioner for bona fide medical use; * *"

Petitioner contends herein that that is no evidence to support the conviction in this record, and that therefore, the conviction deprives her of due process of law under Section I of the Fourteenth Amendment to the

Constitution of the United States and under the jurisprudence as established by this Honorable Court in *Thompson v. City of Louieville*, 362 U.S. 199, 80 Sup. Ct. 624, and *Garner v. State of Louisiana*, 368 U. S. 164, 82 Sup. Ct. 248. Although the State of Louisiana readily agrees that due process of law under Section I of the Fourteenth Amendment to the United States Constitution does prohibit the conviction of one of a crime without any evidence to support that conviction, the State does not agree that this record presents such an impediment to her conviction. The petitioner states in her application to this Honorable Court, as this record will confirm, that five (5) tablets were taken pursuant to a search warrant from her home by the local police authorities (R-98 et seq. and pages 6 & 7 of petitioner's application herein); that these tablets were transported to the Louisiana State Police Crime Laboratory for analysis (R-103 and page 6 of petitioner's application herein); that Mr. Travis Owen, a chemist with the Louisiana State Police Laboratory, ran a qualitative analysis on these tablets (R-63 and page 7 of petitioner's application herein), and that this chemist found the five (5) tablets to contain phenobarbital which in his opinion was a central nervous system depressant or somnifacient (see page 7 of petitioner's application herein). Petitioner claims that the chemist did not make a quantitative analysis of the amount of barbiturate present in these tablets. However, the chemist did testify that he found the five (5) tablets examined by him to contain phenobarbital, a barbiturate. Although the chemist did not make a quantitative

analysis of these tablets in a direct manner, he did so in a relative manner. From a chemical analysis of the tablets he found them to be the same as the chemicals found in a known reference tablet called bellergal. One Dr. Hansen, a defense witness, testified that bellergal contained 40 milligrams of phenobarbital, 6/10 milligrams of ergotamine and 4/10 milligrams of belladonna alkaloids. The chemist testified that the presence of these other materials was not of a sufficient degree or nature or quantity to prevent the use of these tablets as a somnifacient. Dr. Hansen could not testify that these tablets were obtained by petitioner on a prescription issued by him to her. It will thus be seen that there is ample evidence to support the law with which petitioner was charged and convicted in the State Court; that this record is not completely devoid of any evidence whatsoever to support the requirements of the offense under which petitioner was charged and convicted. And therefore the requirements of due process in that respect were met by the State of Louisiana.

Article VII, Section 10 of the Louisiana Constitution of 1921 provides in part that the appellant jurisdiction of the Louisiana Supreme Court shall extend to criminal cases on questions of law alone. Thus, in view of the foregoing cited constitutional provision, the Louisiana State Supreme Court does not inquire into the sufficiency of evidence and it is only where there is a total lack of evidence of an essential element of the offense charged that the Court is justified in setting aside the conviction as a matter of law. *State v. Alnerico*, 1957, 232 La. 847, 93 So.2d 334.

Phenobarbital is a derivative of barbituratic acid and as such is a barbiturate regardless of the presence of other ingredients effecting its quality as a hypnotic or somnifacient drug. A State Supreme Court Justice on the refusal of a rehearing herein, and petitioner herein also contend that the testimony of Dr. Hansen was uncontroverted. However, it will be readily ascertainable from the record that the chemist testified categorically that the presence of other material in these tablets did not prevent their use as a hypnotic or somnifacient drug. It is of significance to note that when Dr. Hansen was asked whether or not bellergal was prescribed as a somnifacient that he did not answer categorically that it was not, but merely said:

> "A. Not by me." (See page 9 of petitioner's application herein.)

The question of course revolving around whether or not there were other materials to prevent the use of the drug as a hypnotic or somnifacient is a matter that comes by way of defense. *LSA R. S. 40:1034* provides:

> "Nothing in this Sub-part shall apply to any coumpound, mixture, or preparation containing, in addition to a barbiturate or a central nervous system stimulant, a sufficient quantity of another potent drug or drugs to prevent its use as (1) a hypnotic, or (2) a somnifacient or (3) a central nervous system stimulant, as the case may be. Acts 1952, No. 296, § 3."

LSA R. S. 40:1044 provides:

> "In any complaint, information or indictment, and in any action or proceeding brought for the en-

> forcement of any provision of this Sub-part, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Sub-part, and the burden of proof in any such exception, excuse, proviso or exemption, shall be upon the defendant. Acts 1952, No. 296, § 13."

If the Court were to accept favorably to petitioner the absence of evidence on this issue of whether or not the other materials present in these tablets would prevent its use as a hypnotic or somnifacient, then this would be detrimental to the defendant, that is petitioner herein, since the burden was upon her to prove that she came within the exemption. Petitioner in essence is not complaining that the State has not provided evidence to sustain its conviction and that the record so reflects, but rather she is complaining because the Court did not accept the testimony of her witness, Dr. Hansen, to the exclusion of the testimony of the chemist on that one particular issue of whether or not a sufficient amount of other material to prevent these tablets from being utilized as a hypnotic or somnifacient drug was present. Rule 19, Paragraph 1, Subsection (a) of this Honorable Court's Rules provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not thereto-

> fore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Thus, for the reasons heretofore stated, it is respectfully submitted that the writ herein sought by petitioner should not be granted because the record herein reflects that there is ample evidentary foundation supporting her conviction.

Petitioner herein also contends that her conviction under the law allegedly is violative of the due process clause of the Fourteenth Amendment in that the said law fails to give her adequate notice of what conduct is or is not proscribed against. Specifically she avers that the utilization of the words "sufficient quantity" is vague and indefinite. Although a similar contention was made by counsel in the State Court, the specific complaint herein was not so made. The complaint made and passed upon by the State Court was that the words "hypnotic or somnifacient drug" were not defined in the law and therefore violative of Article I, Section 10 of the Louisiana Constitution of 1921 and violative of the equal protection clause of the Fourteenth Amendment of the Constitution to the United States. This Court will not pass upon issues on certiorari or on appeal which have not been presented to and passed upon by the State Court. LSA R. S. 40:1033 the law with which petitioner was charged under and particularly paragraph 4 thereof making it unlawful to actually or constructively possess or control a barbiturate and considering the definition of

barbiturate under LSA R. S. 40:1032, the complained of terminology "sufficient quantity" does not appear. The terminology "sufficient quantity of another potent drug" appears in LSA R. S. 40:1034 relative to exemptions which under LSA R. S. 40:1044 come by way of defense and need not be avered in the charge nor negated by the State in the charge. Therefore, if there is any substance to petitioner's contention, it would merely obliterate the exemption provided for in LSA R. S. 40:1044 all to her detriment and would not affect LSA R. S. 40:1033(4) which is the statute under which she was charged, tried and convicted.

CONCLUSION

For the reasons herein set forth, it is respectfully submitted that the petition for writ of certiorari to the Supreme Court of the State of Louisiana be denied.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

SARGENT PITCHER, JR.,
District Attorney,
19th Judicial District Court.

RALPH L. ROY,
Assistant District Attorney,
19th Judicial District Court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief in opposition has been served on (1) Sam J. D'Amico, 610 Reymond Building, Baton Rouge, Louisiana, (2) Ossie B. Brown, 218 St. Louis Street, Baton Rouge, Louisiana, Attorneys for Gladys Jordan, and (3) The Supreme Court of the United States, by depositing the same in the United States Mail, with first class postage, prepaid, properly addressed.

BATON ROUGE, LOUISIANA, this 29 day of November, 1965.

Ralph L. Roy

RALPH L. ROY